	Page
Statute—Interstate Commerce Act:	
Section 5 (2) (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (2)	34
Section 15 (3) (c. 3591, 34 Stat. 589; c. 309, 36 Stat. 551; c. 91, 41 Stat. 485; U. S. C., Title 49, Sec. 15 (3))	34
Section 15 (4) (c. 309, 36 Stat. 552; c. 91, 41 Stat. 485; U. S. C., Title 49, Sec. 15 (4))	35
Section 15 (7) (c. 309, 36 Stat. 552; c. 91, 41 Stat. 486; U. S. C., Title 49, Sec. 15 (7))	36

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 88

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISville and Nashville Railroad Company, and Charleston & Western Carolina Railway Company, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMmerce Commission, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 135) is reported in 48 F. (2d) 239. The report of the Interstate Commerce Commission (R. 13) is reported in 165 I. C. C. 3.

JURISDICTION

The decree of the District Court was entered March 9, 1931. (R. 147.) Petition for appeal was filed April 23, 1931, and was allowed the same day. (R. 155, 156.)

The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

(1) Whether the Greenwood extension of the Georgia & Florida is within the protection of the conditions which the Commission attached to its approval of the Clinchfield lease.

(2) Whether the conditions upon which the Commission approved a lease of the Clinchfield were authorized by Section 5 (2) of the Interstate Commerce Act.

(3) Whether the Commission's order in this case had the effect of requiring the establishment of new through routes within the meaning of Section 15 (3) of the Interstate Commerce Act.

(4) Whether appellants, after they had remained silent during proceedings in which the Commission approved the construction of the Greenwood extension upon the assumption that it was protected by the conditions of the Clinchfield lease, could, after the extension had been constructed, invoke the aid of a court of equity to deny such protection.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra,* pp. 34–37.

STATEMENT

This is a suit in equity under the Act of October 22, 1913, to set aside an order of the Interstate Commerce Commission requiring the cancellation of certain restrictive routing schedules filed by the Atlantic Coast Line and various railroads controlled by it. (R. 1–3, 6, 8, 10.) The order was entered in a proceeding under Section 15 (7) of the Interstate Commerce Act (*infra,* p. 36) initiated by protests filed with the Commission by the Piedmont and Northern Railway Company (hereinafter referred to as the Piedmont) and by the Georgia & Florida Railroad (referred to herein as the Georgia & Florida). (R. 8–9.) The Commission, the Piedmont, and the Georgia & Florida have intervened in defense of the order. (R. 106–107, 111, 121–122.)

The restrictive schedules which the Commission ordered cancelled were filed as supplements to tariffs which contained joint through rates applicable over the line of the Piedmont between Spartanburg, S. C., and Greenwood, S. C., and over the line of the Georgia & Florida between Greenwood and Augusta, Ga. (R. 14.) At Spartanburg the Piedmont connects with the Carolina, Clinchfield & Ohio Railway. (R. 17.) The main line of that railroad and its subsidiaries (referred to herein as the

Clinchfield) runs approximately north and south between Spartanburg and Elkhorn City, Ky. (R. 17.) By reason of a connection between the Clinchfield and the Chesapeake & Ohio Railway Company at Elkhorn City the Clinchfield, Piedmont, and Georgia & Florida are links in a through route between points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other. (R. 20, 85–87.) The purpose of the restrictive schedules was to close the combined line of the Piedmont and Georgia & Florida between Spartanburg and Augusta as a link in this through route and thereby make applicable a combination of higher local rates. (R. 14.)

The Clinchfield is leased to the Atlantic Coast Line and Louisville and Nashville Railroad Company. (R. 18, 23.) The Charleston & Western Carolina Railway Company (hereinafter referred to as the Charleston) has a line running south from Spartanburg, through Greenwood, to Augusta. (R. 17.) The combined line of the Piedmont and the Georgia & Florida between Augusta and Spartanburg is 15 miles longer than the line of the Charleston between these points, but this presents no question of undue circuity. (R. 17.) The lines of the Clinchfield, Piedmont, Georgia & Florida, Charleston, and the lines of the Atlantic Coast Line system are shown in a map attached as an exhibit to appellants' bill. (R. 34.)

Appellants urged in justification of the restrictive schedules that the Atlantic Coast Line, the

Clinchfield, and the Charleston are operated under a common management or control; that the conditions attached to the Commission's order approving the Clinchfield lease do not cover the through rates over the Greenwood extension of the Georgia & Florida; and that to compel maintenance of through rates on traffic carried over the Clinchfield and then over the Piedmont and Georgia & Florida to Augusta, and vice versa, is to require them, without their consent, to join in through routes which do not embrace the entire length of their railroad, in violation of Section 15 (4) of the Interstate Commerce Act (*infra*, p. 35). (R. 136.) Both the Commission and the District Court found that the conditions attached to the Commission's approval of the Clinchfield lease require the maintenance of the Clinchfield as an open route, equally available to all connecting carriers, for the movement of traffic between points at and north of the Ohio River and points in the Southeast and that these conditions apply to through traffic over the Greenwood extension of the Georgia & Florida. (R. 28–30, 141–144.) Since appellants, by accepting the lease, had consented to the through routing, the limitations imposed by Section 15 (4) upon the power of the Commission to establish through routes do not apply. (R. 146.)

The circumstances under which the Commission approved the Clinchfield lease are fully set forth in its report[1] and order in that proceeding, which are

[1] Reported in *Clinchfield Railway Lease*, 90 I. C. C. 113.

part of the record in this case. (R. 67–100.) From the report of the Commission it appears that the Atlantic Coast Line and the Louisville & Nashville in July, 1923, filed a joint application with the Commission under Section 5 (2) of the Interstate Commerce Act (*infra*, p. 34) for authority to lease for 999 years all the property of the Clinchfield. (R. 69, 72.) The Louisville & Nashville proposed, if the lease should be approved, to extend one of its branch lines serving the Hazard coal fields to connect with the Clinchfield at Elkhorn City and to connect another branch line serving other Kentucky coal fields with the Clinchfield south of Elkhorn City. (R. 73–76.) The links with the Clinchfield were expected to open the Southeast as a market for coal mined on these branch lines and to relieve an intolerable car-supply condition on these lines. (R. 73–75.) The Louisville & Nashville nevertheless did not consider it advantageous to build the connections with the Clinchfield unless it had an interest in the haul over that road. (R. 82.) On the part of the Atlantic Coast Line it was urged that the lease would give it and the industries in the territory reached by it access over one system to the coal mines on the Clinchfield. (R. 78, 88.)

The Piedmont, Georgia & Florida and Seaboard Air Line Railway Company, and representatives of certain public and commercial bodies in the Southeast, opposed the granting of an unconditional lease. (R. 69, 90.) The three intervening

carriers represented that if joint rates on traffic moving over the Clinchfield should be closed to them they would be deprived of traffic which might otherwise move over their lines or future extensions thereof, and that existing and potential competitive routes would thereby be destroyed. (R. 19–20.) The Georgia & Florida also opposed the unconditional leasing of the Clinchfield because of its then announced intention of seeking authorization to extend its line to Greenwood so as to obtain, through the medium of the Piedmont & Northern, a connection with the Clinchfield at Spartanburg. (R. 20.) It feared that unconditional approval of the lease would result in restrictions of joint rates which would discriminate against the Greenwood extension in favor of the Charleston. (R. 20.)

Before arriving at any conclusion in the lease proceedings the Commission addressed a memorandum to all the parties requesting consideration of the effect of an order of approval made subject to certain conditions set forth therein. (R. 90.) The Atlantic Coast Line and the Louisville & Nashville filed a written reply in which they objected to conditions 3 and 4 on the ground, *inter alia,* that their effect would be to require them, in operating the Clinchfield, to consent to through routing of competitive traffic and thus to waive the protection which would otherwise be given them by the long-haul provision of Section 15 (4). (R. 35, 46–47, 54.) Notwithstanding this protest, the Commission

found that the lease would be in the public interest only if made subject to these conditions. (R. 91.)

The order approving the lease contains the following proviso (R. 99):

> That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, and numbered from 1 to 5, inclusive.

Two years after this approval of the Clinchfield lease an application by the Georgia & Florida to extend its line from Augusta to Greenwood was submitted to the Commission for decision. The Atlantic Coast Line did not respond to the notice given it, and neither it nor any of its subsidiaries or controlled lines appeared at the hearing. (R. 23.) The Commission in passing upon the application did not consider what specific through routes and joint rates would be applicable over the extension, but it took judicial notice of its findings in the Clinchfield Lease case and it based its approval of the construction primarily on the Georgia & Florida's expected participation in traffic between points north of the Ohio River and points in the Southeast. (R. 23.) It said in its report[2] (R. 22–23):

[2] Reported in *Reorganization and Extension of Georgia & Florida Ry.*, 117 I. C. C. 473.

> Through the medium of the Piedmont & Northern it [Georgia & Florida] will also have an advantageous connection with the Clinchfield Railroad at Spartanburg, S. C., and through this connection it expects to realize a substantial participation in the tonnage of coal and other commodities moving southbound over the Clinchfield destined to southern Georgia and Florida, and in the northbound movement of freight, principally citrus fruits and vegetables, from southern territory. The lines of the Southern Railway and the Charleston & Western Carolina, the latter a part of the Atlantic Coast Line system, also extend between Greenwood and Spartanburg, connecting with the Clinchfield, but as both of these lines have their own connections to the south the Georgia & Florida must look principally to the Piedmont & Northern for its interchange with the Clinchfield.

The Greenwood extension was subsequently built at a cost of about $3,300,000. (R. 128, 141.) The Atlantic Coast Line was thus charged with knowledge that the Commission had approved construction of this extension upon the premise that the extension would have the benefit of joint through rates, equal to those applying on transportation over the Atlantic Coast Line system, on traffic moving over the Clinchfield between points north of the Ohio River and points in the Southeast. The Atlantic Coast Line did not question this right, so far as the record shows, until the extension had

been practically completed, when the restrictive schedules here involved were filed.[3]

SUMMARY OF ARGUMENT

I. When the Atlantic Coast Line and the Louisville & Nashville applied to the Commission for approval of acquisition of control of the Clinchfield by a joint lease of its properties, the Commission found that the lease would be in the public interest only upon certain conditions. Conditions 3 and 4 were imposed to meet the objection made by intervening carriers that an unconditional lease would destroy existing and potential through routes via the Clinchfield. The Georgia & Florida, one of the interveners, announced that it planned to extend its line to Greenwood and expressed apprehension that an unconditional lease would result in discrimination against this extension, when constructed, in the matter of joint rates on through traffic passing over the Clinchfield and the intermediate line of the Piedmont. The broad language of the conditions and the facts before the Commission when they were imposed negative an intention to limit their application to lines physically connecting with the Clinchfield. But even if the protection which they give is so limited, the restrictive routing schedules which the Commission in this case

[3] The Georgia & Florida alleges that appellants, prior to the filing of the restrictive schedules, made no objection at any time to the authorization or construction of the extension. (R. 128.)

ordered cancelled are a violation of the conditions of the Clinchfield lease because the schedules discriminate against the Piedmont in the matter of joint through rates and the Piedmont directly connects with the Clinchfield.

So far as the present controversy is concerned, there is no substantial difference between the meaning of conditions 3 and 4 as worded in the Commission's report and their meaning as worded in the Commission's preliminary proposal while the lease was under consideration. The conditions are also not inconsistent with the Commission's findings in its report on the Clinchfield lease.

II. Section 5 (2) of the Interstate Commerce Act authorizes the Commission to approve the acquisition of control of another carrier by lease "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." Conditions 3 and 4 of the Clinchfield lease are within the statutory authority thereby conferred upon the Commission. They relate exclusively to transportation conditions and provide for the interchange of certain through traffic between interstate carriers on a nondiscriminatory basis. Preservation of competition is a factor which the Commission may properly consider in passing upon the public interest involved in the acquisition of control of another carrier. The conditions are not in conflict with the long-haul provision of Section 15 (4) of the Interstate Commerce Act since the Commission's order in the Clinchfield

Lease case did not require the applicants to establish, without their consent, any through route which did not embrace substantially the entire length of their lines.

III. The restrictive routing schedules which the Commission ordered cancelled were filed as supplements to tariffs which had previously established through routes and joint rates applicable over the Greenwood extension. The provisions of Section 15 (3) of the Interstate Commerce Act requiring a finding of public interest prior to the establishment by the Commission of new through routes are therefore inapplicable.

IV. When the Georgia & Florida applied to the Commission for approval of an extension of its line to Greenwood, the Atlantic Coast Line did not respond to the Commission's invitation to state its objections, if any, to the proposed extension. The Atlantic Coast Line was charged with knowledge that the construction of this extension would be justified only on the assumption that it could participate in through traffic via the Clinchfield. Its silence when the construction was under consideration reasonably implied acquiescence in the view that the extension was within the protection of the conditions attached to the Commission's approval of the Clinchfield lease.

After the Greenwood extension had been practically completed the Atlantic Coast Line and the other appellants, whom it controls, brought this suit in equity alleging that the conditions of the

Clinchfield lease do not apply to the Greenwood extension. Appellants are estopped from maintaining this suit since their previous silence, when under a duty to speak, has led the Georgia & Florida materially to change its position. But even if they are not equitably estopped, a court of equity will not aid a complainant whose previous conduct makes the assertion of his rights unconscionable.

ARGUMENT

I

THE GREENWOOD EXTENSION OF THE GEORGIA & FLORIDA IS WITHIN THE PROTECTION OF THE CONDITIONS WHICH THE COMMISSION ATTACHED TO ITS APPROVAL OF THE CLINCHFIELD LEASE

The Commission approved the Clinchfield lease subject to acceptance by the applicants of five conditions. Condition 1 requires the maintenance of a separate organization for the Clinchfield so that the road "shall constitute a separate operating unit, having a responsible management directly in charge of the operations of such properties." (R. 91.) Conditions 2 and 5 do not concern the present controversy.

Condition 3 requires the continuance of existing routes and channels of trade, existing gateways for the interchange of traffic, and "the present neutrality of handling traffic inbound and outbound" so as to permit equal service, routing, and movement of competitive traffic to and from all connect-

ing lines reached by the Clinchfield. It reads (R. 91):

> So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic.

Condition 4 requires applicants to permit carriers then connecting with the Clinchfield, or which may thereafter connect with it, to participate, without discrimination, in through routes and joint rates on traffic moving over the Clinchfield as an intermediate road between points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other. It declares that the purpose is to have the Clinchfield maintained as an open route for traffic between the points designated, equally available to all car-

riers connecting with it. The condition reads (R. 91–92):

> The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River, on the one hand, and points in the southeastern and Carolina territory, on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated.

87368—31——3

Appellants stand on a narrow and technical construction of these conditions. They urge, in effect, that even if the Commission intended to keep the Clinchfield open, without discrimination, to all carriers desiring to use it as a link in a through route between the territory north of the Ohio River and the Southeast, the conditions can not be construed so as to apply to the Greenwood extension of the Georgia & Florida. They contend that their requirements are limited to "connecting" lines and therefore do not cover a railroad connecting with the Clinchfield only through the medium of an intermediate line.

It is, we submit, clear that the Commission intended to protect through traffic over the contemplated Greenwood extension. The Georgia & Florida was one of the three carriers which intervened in opposition to the Clinchfield lease. (R. 69.) It then announced its purpose of seeking approval of an extension of its line to Greenwood and expressed apprehension that, if the Clinchfield were unconditionally leased, this extension would be discriminated against in favor of the Charleston (controlled[4] by the Atlantic Coast Line) in the matter of joint rates. (R. 20.) The lease

[4] When we refer in this brief to control of the Charleston by the Atlantic Coast Line, we mean that the stock of both companies is owned by substantially the same interests. (R. 24.) We do not thereby concede that the Charleston was operated by the Atlantic Coast Line "under a common management or control" within the meaning of Section 15 (4) of the Act.

was opposed on the ground that it would destroy potential, as well as actual, routes. (R. 85.) Conditions 3 and 4 were imposed to meet this objection. (R. 28.) Since the Georgia & Florida is not separately mentioned, it is plain that the Commission believed that its interests were being protected as fully as those of the other protesting carriers.

In the present case the Commission, after quoting that part of its lease report which stated the position of those opposed to an unconditional lease, said (R. 28–29):

> The conditions imposed, and accepted by the Coast Line and the L. & N., were intended to provide in substance for the advantages thus requested, and, fairly construed, should have that effect. Their purpose was to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad on the other hand, which were the relationships usually and normally existing between independent railroads and those whom it serves.

The Commission rejected appellants' construction of the term "connecting." It said (R. 28–29):

> There is no warrant for limiting the meaning of "connecting lines" to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term. The technical nature of this contention of respondents becomes apparent when it is con-

sidered that under their construction the conditions would necessarily apply to any extension of operations by the Piedmont, regardless of effect in short hauling the Coast Line.

Black v. *Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130, 398, 402, held that two railroads connected only by means of intervening roads were "connected" within the meaning of a New Jersey statute permitting consolidation of railroads "whose works shall form with their own connected or continuous lines."

The Commission found that as an independent line the Clinchfield would welcome an additional competing route for the movement of its traffic to and from the territory served by the Georgia & Florida. (R. 29.) It pointed out that the proposed restriction of routing would, therefore, seriously impair the obligation, imposed by condition 3, to continue the "present neutrality" of the Clinchfield in handling traffic. (R. 29.)

We also submit that through traffic over the Greenwood extension is within the protection of the conditions attached to the Clinchfield lease even if the protection there given is limited to lines physically connecting with the Clinchfield. The Piedmont, by reason of its connection with the Clinchfield on the north and with the Georgia & Florida on the south, is part of a through route between points at and north of the Ohio River and points

in the Southeast. The restrictive schedules filed by appellants closing the Greenwood extension to joint rates on through traffic between these points prevent the Piedmont from participating in this through traffic via its connection with the Georgia & Florida at Greenwood. Appellants can not close the Piedmont line to this through traffic by restrictions preventing it from interchanging traffic with the Georgia & Florida on the basis of joint rates. The conditions of the Clinchfield lease require that road to be maintained "as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (R. 92.) It is not so equally available if the Atlantic Coast Line system can reach the Southeast on joint rates but the Piedmont can not reach the same region, via the Georgia & Florida, on the same joint rates.

The wording of conditions 3 and 4 in the Commission's report differs slightly from the wording of these conditions in the preliminary proposal which it submitted to the parties in the lease proceeding. Appellants contend (brief, pp. 15–22) that the conditions as adopted do not have the same meaning as the conditions originally proposed and also contend (brief, pp. 17, 22) that the changes made in each condition met the principal objection thereto of the lessees. The Commission in its report on the lease said (R. 92):

> The applicants have protested vigorously against the imposition of conditions 3 and 4.

> We have considered fully their representations, however, and have reached the conclusion that without the observance of these conditions by the applicants we are unable to find that the proposed acquisition of control would be in the public interest.

The changes in wording were considered so unimportant that they are not even mentioned by the Commission. The Commission noted the applicants' objections to the conditions and stated that it had nevertheless determined to adhere to them. Not only did the Commission put the lessees on notice that it had not met their objections to the conditions but the changes themselves do not in any way support appellants' contention.

The Commission made three changes in condition 4.[5] The first and last broaden its scope. The second, upon which appellants rely, substitutes "and" for "which." It seems unlikely that this was intended to effect a change in meaning. If so, the prohibition against discrimination was made

---

[5] The following shows the changes, words added being italicized and words omitted being enclosed in brackets:

The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond

general instead of being limited to discrimination in the division of joint rates and the scope of the condition was broadened, not narrowed.

The changes in condition 3 are equally unimportant.[6]

The condition as adopted requires existing routes, gateways of interchange, and the present neutrality

---

the Ohio River on the one hand and points in the southeastern *and Carolina* territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization on the one hand and by the other participating carrier or carriers on the other, [which] *and* shall not discriminate as to rates, *fares and charges* against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated. (R. 45, 91–92.)

[6] The following shows the changes, words added being italicized and words omitted being enclosed in brackets:

So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service *and routing or movement of traffic which is competitive with traffic of the applicants or either of them* to and from all connecting lines reached by the line of the Clinchfield Companies without discrimination [as to routing or movement of traffic which is competitive with traffic of the applicants or either of them, and without discrimination] *in service* against such competitive traffic [in arrangement of schedule]. (R. 41–42, 91.)

of handling traffic to be continued so as to permit equal opportunity for service " and routing or movement of traffic which is competitive with traffic of the applicants, or either of them." The quoted words were added; they originally appeared in a later qualifying prepositional clause. The obligation to afford equal opportunity for routing and movement of competitive traffic was therefore made direct instead of indirect. In addition, discrimination "in service" instead of discrimination "in arrangement of schedule" was prohibited. Certainly these changes did not narrow the scope of the condition.

Appellants also contend (brief, pp. 36–37) that conditions 3 and 4 are inconsistent with the Commission's findings in the Clinchfield Lease case. The provisions of these conditions that the Clinchfield retain the status of an independent road in the matter of certain through routing is alleged to be inconsistent with the Commission's finding that the usefulness of the Clinchfield would be circumscribed as long as it continued independent. There is no inconsistency here. The Commission was weighing various "conflicting interests in order to determine the ultimate public interest." (R. 77.) On the one hand, the Clinchfield was not receiving its proportionate share of through traffic because its connections generally preferred longer hauls by more circuitous routes over their own lines. (R. 84, 89.) On the other hand, unconditional approval of the lease might "destroy certain existing and

potential routes, withdraw effective competition as to large areas reached by the Coast Line, and give the Coast Line an undue advantage in transportation in the Southeast." (R. 85.) Weighing these considerations, the Commission found the latter were important; it explicitly said that the lease would be in the public interest only upon the conditions set forth in its report. (R. 91, 93.)

The District Court said that the failure of the Atlantic Coast Line to protest when authorization to build the Greenwood extension was pending before the Commission "is a pertinent matter for consideration in determining the meaning of the conditions." (R. 141.) Appellants (brief, pp. 44–45) take exception to this statement. But they are faced with this dilemma. Either the lessees then construed the conditions as they have been construed by the Commission and the District Court, in which case the lessees' interpretation of the lease when the question first arose is material in determining the meaning of the conditions; or the lessees then held their present view, in which case they can not obtain the aid of a court of equity in enforcing rights the assertion of which is unconscionable because their past silence has led the Georgia & Florida to change its position. We urge later (*infra*, pp. 28–32) that if the lessees have always believed that they were entitled to discriminate against the Greenwood extension they have been under a duty to speak from the time when the

building of that extension was first presented to the Commission.

II

THE CONDITIONS UPON WHICH THE COMMISSION APPROVED A LEASE OF THE CLINCHFIELD WERE WITHIN ITS STATUTORY AUTHORITY

Section 5 (2) of the Interstate Commerce Act (*infra*, p. 34) provides that whenever the Commission, after hearing, is of the opinion that the acquisition by one carrier of the control of another under a lease will be in the public interest, it may authorize such acquisition "on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." We submit that conditions 3 and 4 of the Clinchfield lease are well within the power conferred upon the Commission by these provisions of the Act.

The conditions relate to interstate commerce and to the rights and duties of carriers engaged in interstate commerce. They provide for the interchange of traffic between the Clinchfield and other interstate carriers on a nondiscriminatory basis. The Commission permitted a control of the Clinchfield which would serve the purposes advanced by the Atlantic Coast Line and the Louisville & Nashville as reasons for the lease provided they were willing to maintain actual and potential competitive relationships which depended upon a continuance of equal opportunity to participate in through joint rates over the Clinchfield. That preservation of

competition is a factor which may properly be considered by the Commission in passing upon the public interest involved in the acquisition of control of a railroad is shown by Section 5 (4) of the Interstate Commerce Act (c. 91, 41 Stat. 456, 481). After authorizing the Commission to prepare a plan for the consolidation of railroads into a limited number of systems, it provides:

> In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained.

Where a proposed acquisition of control would tend to create a local monopoly of railroad transportation, contrary to the public interest, the Commission should be particularly zealous to guard against this result since, by virtue of Section 5 (8) of the Act (c. 91, 41 Stat. 456, 482), anything done pursuant to an order of the Commission authorizing acquisition of control of another carrier is relieved from the operation of the Federal "antitrust laws."

Chesapeake & Ohio Ry. Co. v. *United States,* 283 U. S. 35, held that the Commission, in reaching a determination that proposed extensions of railroad lines are required by the public interest, may properly consider the desirability of preserving competition between rival railroad systems.

The conditions which the Commission attached to its approval of the Clinchfield lease are not in

conflict with the provisions or policy of Section 15 (4) of the Act (*infra,* p. 35), which prohibit requiring a carrier to establish, "without its consent," any through route which does not embrace substantially the entire length of its line (including lines of controlled carriers) between the termini of the proposed route. The Commission's order in the Clinchfield Lease case did not require the Atlantic Coast Line or the Louisville & Nashville to abandon any protection given by Section 15 (4) in respect of their existing lines. In respect of the Clinchfield, the order of the Commission gave these carriers the option of consenting to certain through routing over that road or abandoning their plan to lease that road, a plan which, without such consent, was not in the public interest and, therefore, could not be approved by the Commission. See *Chicago Junction Case,* 264 U. S. 258, 265.

The conditions were not imposed arbitrarily. They were requested by interested carriers and were based on a study of transportation conditions which, in the opinion of the Commission, necessitated the conditions if the lease was to be in the public interest.

As the District Court said, *United States* v. *Chicago, Milwaukee & Pacific R. R. Co.,* 282 U. S. 311, "is not remotely in point." (R. 145.) That case held that part of a condition attached to an order of the Commission approving the issuance of certain railroad securities was beyond the power of the

Commission and should be set aside. The basis of the decision is that by the condition the Commission attempted to control the disposition of a fund created by a contract which was not one in respect of interstate commerce, to which the carrier in question was not a party and in which it had no enforceable interest. It was therefore held that the Commission had not acted within the constitutional grant of authority to regulate interstate commerce.

III

THE ORDER OF THE COMMISSION IN THIS CASE DOES NOT HAVE THE EFFECT OF ESTABLISHING NEW THROUGH ROUTES AND THE PROVISIONS OF SECTION 15 (3) OF THE INTERSTATE COMMERCE ACT DO NOT APPLY

Appellants contend (brief, pp. 46–48) that the Commission's order is invalid because it had the effect of directing the establishment of new through routes without the finding of public interest required by Section 15 (3) of the Interstate Commerce Act (*infra,* p. 34). The Commission sustained this contention as to 33 of the 337 schedules originally involved, on the ground that the Georgia & Florida was not a party to these 33 schedules. (R. 15.) The Commission rejected the contention as to the remaining schedules on the ground that they were filed as supplements to tariffs which had previously established through routes and joint rates which would automatically become applicable over the Greenwood extension upon its opening. (R. 14, 15.)

These restrictive schedules therefore stated a new regulation or practice affecting existing rates and charges within the meaning of Section 15 (7) of the Act (*infra*, p. 37) and the requirements of Section 15 (3) are inapplicable to these schedules. Through routes and joint rates named in tariffs which have been filed with the Commission constitute existing routes and rates, although there has been no movement of traffic thereunder. See *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 666.

The action of the Commission did not open new routes, because the restrictive schedules which it ordered cancelled were supplements to tariffs to which the Georgia & Florida was a party. Where an unrouted tariff is concurred in by a number of carriers freight may be routed over an extension of any such carrier even though the extension was built after the tariff concurrence. This is accepted tariff practice. See Commission's Tariff Circular 20, Rule 64.

IV

THE SILENCE OF APPELLANTS WHEN THEY WERE UNDER A DUTY TO SPEAK ESTOPS THEM FROM MAINTAINING THIS SUIT OR AT LEAST RENDERS THEIR PRESENT ASSERTION OF RIGHTS SO UNCONSCIONABLE THAT THEY CAN NOT INVOKE THE AID OF A COURT OF EQUITY.

When the Georgia & Florida applied to the Commission for permission to extend its line from Augusta to Greenwood the Atlantic Coast Line knew that this carrier, in opposing an unconditional

lease of the Clinchfield, had attached importance to the right of this extension, when constructed, to participate in joint rates on through traffic via the Clinchfield. It knew that the building of the proposed extension might be, as the Commission found, a matter of life and death to the Georgia & Florida and to the territory which it served, the road having been operated by receivers at a loss since 1915.[1] It knew that the conditions attached to the authorization of the Clinchfield lease might be interpreted as entitling the Greenwood extension to participate on equal terms in joint rates on through traffic moving over the connected lines of the Clinchfield, the Piedmont, and the Greenwood extension.

The construction of the Greenwood extension was justified only on the assumption that it could participate in through traffic passing over the Clinchfield. (R. 142.) The Atlantic Coast Line could not be blind to this situation. It knew the traffic and revenue possibilities of the region since the Charleston, which it controlled, operated a line between Augusta and Greenwood.

We submit that under these circumstances the Atlantic Coast Line was under a duty, if it interpreted the Clinchfield lease to permit discrimination against the Greenwood extension, to declare its construction of the lease. Its silence might not only interfere with a proper exercise of the duty imposed

---

[1] *Reorganization and Extension of Georgia & Florida Ry.*, 117 I. C. C. 473, 474, 486–487, *supra*.

upon the Commission to determine whether public convenience and necessity required the extension, but might also lead the Georgia & Florida and investors in its securities into needless loss. The Atlantic Coast Line nevertheless did not appear at the hearing or respond to the Commission's invitation to state its objections, if any, to the proposed extension.[8] So far as the record shows this silence continued until the present proceedings commenced, when the extension had been practically completed at a cost of about $3,300,000. (*Supra*, p. 9.)

Appellants contend (brief, pp. 44–45) that their silence was justified because the Commission did not consider in the construction case what specific through routes and joint rates would be applicable over the extension. But it did take judicial notice of its findings in the Clinchfield Lease case and its principal reason for approving the construction was the expected "substantial participation" by the extension in through traffic via the Clinchfield, an expectation which could not be realized if the extension was not entitled to equal joint rates on this traffic. (R. 22–23, 142.)

Equity will not allow a person who has assumed a legal position, upon which another party has relied, to change his position to the prejudice of that other party. *Davis* v. *Wakelee*, 156 U. S. 680. In *Swain* v. *Seamens*, 9 Wall. 254, 274, this Court, in

[8] *Reorganization of Extension of Georgia & Florida Ry.*, 117 I. C. C. 473, 478–479, *supra*.

holding that estoppel was a complete answer to the defense of the statute of frauds, said:

> Where a person tacitly encourages an act to be done, he can not afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

This is a suit in equity under the Act of October 22, 1913, to enjoin an order of the Interstate Commerce Commission. The ordinary principles of equity apply to such a suit. In *Alabama* v. *United States,* 279 U. S. 229, 230, this Court said with reference to an application for a temporary injunction in a suit brought under that Act:

> But there is nothing in the legislation to suggest that in the exercise of the judicial power in respect of such writs pertinent principles of equity as theretofore understood, are to be disregarded or modified.

We do not assume any intentional bad faith on the part of the Atlantic Coast Line in failing to make known its position when the Georgia & Florida sought approval of the Greenwood extension. But we do contend that the Atlantic Coast Line was silent when it was under duty to speak, that this silence reasonably implied acquiescence in the view that the Greenwood extension would be within the protection of the conditions attached to the Clinchfield lease, that the Georgia & Florida relied upon

such protection in constructing the extension, and that it is unconscionable for the Atlantic Coast Line and the other appellants, whom it controls, now to deny that the extension is protected by the conditions of the lease.

He who comes into equity must come with clean hands. In *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338, the Court in affirming a decree denying an interlocutory injunction said:

> Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief.

In *Deweese* v. *Reinhard,* 165 U. S. 386, 390, the Court said:

> A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

We submit that appellants are equitably estopped from maintaining the present suit. But even if appellants are not estopped, we submit that their conduct makes the assertion of their rights highly inequitable and unconscionable and that a court of equity will not aid in the enforcement of such rights.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
H. L. UNDERWOOD,
Attorney,
Interstate Commerce Commission,
Of Counsel.

NOVEMBER, 1931.

APPENDIX

The Interstate Commerce Act provides:

SEC. 5. (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. (C. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (2).)

SEC. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of

a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. (C. 3591, 34 Stat. 589; c. 309, 36 Stat. 551; c. 91, 41 Stat. 485; U. S. C., Title 49, Sec. 15 (3).)

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable

through route which could otherwise be established: *Provided,* That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. (C. 309, 36 Stat. 552; c. 91, 41 Stat. 485; U. S. C., Title 49, Sec. 15 (4).)

SEC. 15. (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not

for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * * (C. 309, 36 Stat. 552; c. 91, 41 Stat. 486; U. S. C., Title 49, Sec. 15 (7).)

U. S. GOVERNMENT PRINTING OFFICE: 1933